STATE OF MICHIGAN

SUPREME COURT

Appeal From Michigan Court of Appeals # 234661 (Judge Owens)

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| PEOPLE OF THE STATE OF MICHIGAN, | SUPREME COURT NO: 121698 |
| Plaintiff-Appellant, | COURT OF APPEALS NO: 234661 |
| v | LOWER COURT NO: 00-1138-SM |
| MICHAEL BRANDON SCHERF, | CIRCUIT COURT NO: 00-337-AR |
| Defendant-Appellee. / | |


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# PLAINTIFF-APPELLANT'S BRIEF ON APPEAL
# ORAL ARGUMENTS REQUESTED

Respectfully submitted,
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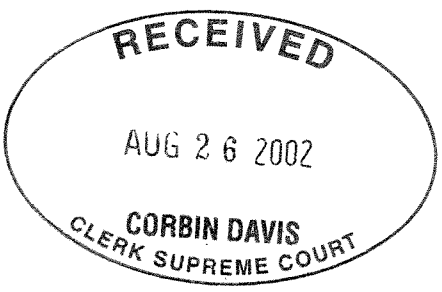


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## STATEMENT OF QUESTION INVOLVED

**I. WHETHER MICHIGAN STATE COURTS SHOULD RECOGNIZE THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE?**

**THE DISTRICT COURT WOULD ANSWER, "YES."**

**THE CIRCUIT COURT WOULD ANSWER, "NO."**

**THE COURT OF APPEALS WOULD ANSWER, "NO."**

**THE PLAINTIFF-APPELLANT WOULD ANSWER, "YES."**

**THE DEFENDANT-APPELLEE WOULD ANSWER, "NO."**

## STATEMENT OF FACTS

On 10/4/96 the Defendant pled guilty to MCL 333.7401(2)(D)(11); MSA 14.15(7401), Controlled Substance-Delivery/Manufacture 5-45 kilograms of Marihuana, and the People dismissed count two, MCL 333.7405(D); MSA 14.15(7405), Controlled Substance-Maintaining a Drug House. The Defendant was placed on Holmes Youthful Trainee Status by the sentencing judge. While on probation, near the end of 1997 the Defendant moved out of state without permission and did not check in with his probation officer for over 2 ½ years as required. Due to this and other probation rule violations, the probation agent filed a petition requesting that a bench warrant be issued and that the Defendant be held in contempt of court. This petition was technically invalid as it was not supported by an affidavit as required by MCR 3.606. Nonetheless, a bench warrant was issued by Judge Paul Chamberlain which ordered the police to arrest the Defendant.

On 7/28/00, the police were interviewing the Defendant as a suspect on a larceny complaint. After it was discovered that there was a warrant for his arrest in the Law Enforcement Information Network (LEIN), that warrant was confirmed, and he was arrested. During a search incident to that arrest, the police officer found approximately 12 grams of marihuana, in a baggy, on the Defendant's person. The Defendant was then charged with MCL 333.7403(2)(D); MSA 14.15(7403), Possession of Marihuana in the instant case.

On 10/5/00, the Defendant pled guilty to violating his probation on the Delivery case. However, the judge did not revoke the Defendant's Holmes Youthful Trainee Status and did not sentence him to any additional jail time. The judge merely ordered that the Defendant be placed

on one additional year of probation and serve 45 days on a tether. (Appendix, p. 19a).

On the instant Possession of Marihuana case, the defense filed a motion to suppress, which was denied on 10/25/00. On 12/1/00, the Defendant pled guilty as charged, with a stipulation that he could appeal the District Court order as of right to the Circuit Court. (p. 20a-21a). An order to stay the sentencing of the Defendant was filed on 12/1/00. The Defense appealed. On 4/20/01, oral arguments were heard. The Circuit Court reversed the District Court by ruling that the good faith exception to the exclusionary rule does not apply in Michigan state courts. (pp. 13a-14a & 22a-25a). Therefore, the charges were dismissed pursuant to an order filed with the court on May 21, 2001.

The Court of Appeals granted application for leave to appeal on July 26, 2001. On May 21, 2002, the Court of Appeals released a published opinion which ruled that the Michigan Constitution provides no greater protection than the United States Constitution regarding unlawful searches and seizures under the Fourth Amendment. (p. 17a). The Court further stated that the "*Evans* and *Leon* decisions [which accept good faith] are binding precedent in Michigan." (p. 17a). Additionally, the Court of Appeals said that it "believe[s] that the circuit court erred as a matter of law by not applying the 'good faith' exception to the exclusionary rule." (p. 17a). However, the Court felt that it was bound by *People v. Hill*, 192 Mich App 54; 480 NW2d 594 (1991) which rejected the good faith argument. (p. 17a). The Court, therefore, reluctantly affirmed the Circuit Court's suppression of the evidence despite that fact that the Court believed "that Michigan should, as a matter of law, recognize the 'good faith' exception." (p. 17a). The Court concluded by saying that it would reverse if the Court was not obligated to follow *Hill*. (p. 17a).

# ARGUMENT

## I. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IN MICHIGAN STATE COURTS.

### A. Applicable Standards

The issue before this Court is a question of law and, as such, is to be reviewed *de novo*. *People v. Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

### B. Standards Applied

Defendant asserts that the good faith exception to the exclusionary rule does not apply in Michigan state courts. Consequently, Defendant claims that the marihuana found on the Defendant during his arrest, pursuant to a technically invalid warrant, should be suppressed. Defendant makes this claim despite the fact that the police acted in good faith and had no knowledge that the warrant was invalid. The Defendant requests this Court to affirm the Michigan Court of Appeals ruling in that regard. The People ask that it be reversed.

This Court adopted the exclusionary rule for Michigan state courts in 1919. *People v. Marxhausen*, 204 Mich 559; 171 NW 557 (1919). The exclusionary rule is a judicially created rule which states that evidence seized in violation of Article 1, section 11 of the Michigan Constitution or of the Fourth Amendment of the United States Constitution will be excluded from evidence in a criminal case against him. See *Id.* and *U.S. v. Leon*, 468 US 897; 104 S Ct 3405, 82 L Ed2d 677 (1984). It was designed to deter illegal police activity. *People v. Manning*, 243 Mich App 615; 624 NW2d 746 (2000). In *People v. Stevens*, 460 Mich 626; 597 NW2d 53 (1999), this Court said that "[t]he exclusionary rule is not meant to put the prosecution in a worse position than if the **police officers'** improper conduct had not occurred, but, rather, it is to

prevent the prosecutor from being in a better position because of the conduct." *Id.* at 640-41 citing *Nix v. Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed2d 377 (1984) (emphasis added).

When that deterrent purpose cannot be met, it would be illogical to continue to blindly enforce the rule. In 1984, the good faith exception to the exclusionary rule was carved out by the United States Supreme Court. *Leon, supra.* That exception provides that if the police act in objective good faith, the exclusionary rule will not be applied to suppress the evidence seized even though a person's rights against illegal searches and seizures were violated. *Id.* This modification of the rule was done "without jeopardizing its ability to perform its intended functions." *Id.* at 905. The Court in *Leon* pointed out that the exclusionary rule is a judicially created rule and is not a constitutionally required remedy. *Id.* at 906. Therefore, the rule should only be applied when it would deter police conduct and not when the judge or magistrate has erred. *Id.* at 916. Otherwise, if applied indiscriminately, the rule would "impede unacceptably the truth-finding functions of judge and jury" and "may well generate disrespect for the law and administration of justice." *Id.* at 907-08. The Court further stated that when an error is attributable to a judge or magistrate, suppression of the evidence will not deter that judge or magistrate in the future. *Id.* at 916.

> [W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' *Id.* at 919-20 citing *Stone v. Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed2d 1067 (1976).

In the instant case, the Circuit Court judge ordered the police to arrest the defendant and that is

exactly what was done. The arresting officer knew nothing of the missing affidavit. Additionally, the police had nothing to do with seeking the warrant or providing the information which caused the judge to issue the warrant. The error committed in this case is attributable to the judge for signing the warrant without the required affidavit.

Several older cases have held that the good faith exception to the exclusionary rule does not apply in Michigan state courts. See *People v. Bloyd*, 416 Mich 538; 331 NW2d 447 (1982); *People v. Hill*, 192 Mich App 54; 480 NW2d 594 (1991); *People v. Landt*, 188 Mich App 234; 469 NW2d 37 (1991); *People v. Sellars*, 153 Mich App 22; 394 NW2d 133 (1986).

In *People v. Beavers*, 393 Mich 554; 227 NW2d 511 (1975), this Court held that the Michigan Constitution affords people more protection than does the Fourth Amendment to the United States Constitution. However, in 1991, this Court overruled that decision in *People v. Collins*, 438 Mich 8; 475 NW2d 684 (1991), when it ruled that Article 1, section 11 of the Michigan Constitution does not provide any additional protection for citizens than does the Fourth Amendment of the United States Constitution. *Id.* at 40. This ruling was confirmed in *People v. Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993). In that case, the Court ruled that "[b]ecause the Michigan Constitution does not provide more protection than its federal counterpart . . . federal law controls . . . ." *Id.* at 158. These recent ruling are consistent with case law which analyzed the Michigan Constitutional Convention of 1961. In *People v. Nash*, 418 Mich 196; 341 NW2d 439 (1983), this Court discussed the language proposed by the Committee on Declaration of Rights, Suffrage, and Elections. In particular, the Committee proposed that the phrase "[e]vidence obtained in violation of this section shall not be used except as authorized by law" be adopted. *Id.* at 211. The Court reasoned that the "except as authorized

by law" portion was an indication "that the committee was attempting to allow for the possibility of a less stringent application of the exclusionary rule if allowed by federal law, rather than attempting to strengthen Michigan search and seizure protection." *Id.* at 212. Further, the Court points out that according to Committee Proposals and Reports, the Committee wrote that:

> [s]hould the definition of the federal limits imposed on the States with respect to the admissibility of evidence change in the future, the Michigan Legislature and the Michigan courts could incorporate, in statute and court decisions, those rules with respect to the admissibility of evidence which reflect the opinion of the Legislature and Michigan courts as to what ought to constitute sound practice in this State, subject only to the continuing recognition of the limits set by federal constitutional supremacy. *Id.*

This Court also noted that "[t]here is no indication that in readopting the language of Const.1908, art. 2, sec. 11 the people of this state wished to place restrictions on law enforcement activities greater than those required by the federal constitution. In fact, the contrary intent is expressed." *Id.* at 213. These discussions were rehashed and reaffirmed by this Court in 1991 in *Collins*, *supra* at 27-29.

The People have located numerous Michigan cases which were decided after *Hill* that considered the good faith exception to the exclusionary rule. A careful review of these cases suggests that the good faith exception to the exclusionary rule now applies in Michigan state courts.

First, in *People v. Powell*, 201 Mich App 516; 506 NW2d 894 (1993), Judge Corrigan cited *Michigan v. Tucker*, 417 US 433; 94 S Ct 2357; 41 L Ed2d 182 (1974) in the lead opinion for the proposition that "the deterrent purposes of the exclusionary rule assume that the police have engaged in wilful or negligent conduct that has deprived the defendant of some right. The

remedy ignores the prospect of unjust acquittal on the theory that the lesson to offending police officers is worth the high cost." *Powell* at 529. When the cost is high and the violation is *de minimis*, the exclusionary rule should not be applied. It would not promote its deterrent purpose but instead would promote "public disrespect for the legal process." *Id.* According to Judge Corrigan, the good faith exception to the exclusionary rule applies in Michigan. However, while the other judges concurred in the result, neither would concur with the section of Judge Corrigan's opinion regarding good faith.

In *People v. Paladino*, 204 Mich App 505; 516 NW2d 113 (1994), the Michigan Court of Appeals cited *People v. Hill*, 192 Mich App 54; 480 NW2d 594 (1991) for the proposition that the good faith exception does not apply in Michigan state courts. *Id.* at 507. However, the *Hill* opinion was decided in 1991, two years before the *Faucett* decision in which this Court held that there was no greater protection under the Michigan Constitution than the United States Constitution in the area of Fourth Amendment protection. Interestingly, the Court of Appeals, as it did in the instant case, mentioned that it would have ruled in favor of the good faith exception if it was not bound by *Hill*. "A panel of this Court has rejected application of the good-faith rule . . . [w]ere we not so compelled [to follow *Hill*], we would reach the opposite conclusion." *Paladino* at 507.

Next, in *People v. Hellis*, 211 Mich App 634; 536 NW2d 587 (1995), the lead opinion, written by Judge O'Connell, clearly states that the good faith exception now applies in Michigan. *Id.* at 647-49. However, while the other two judges agreed upon the result of the ruling for other reasons, they did not come to a consensus opinion regarding good faith. Judge Jansen stated that the good faith exception does not apply in Michigan. Judge Holbrook Jr. stated that whether the

good faith exception to the exclusionary rule applies in Michigan was not at issue and would not be decided in that opinion.

In *People v. Nunez*, 242 Mich App 610; 619 NW2d 550 (2000), Judge O'Connell again contends that the good faith exception to the exclusionary rule applies in Michigan state courts, this time in a concurring opinion. According to O'Connell, "[t]he exclusionary rule, because it prevents the consideration of probative evidence, 'imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions.' . . . Therefore, the exclusionary rule should be applied only where it advances its purpose of deterring future unlawful police misconduct." *Id.* at 624.

In *People v. Wood*, 450 Mich 399; 538 NW2d 351 (1995), Justice Boyle, in a concurring opinion, wrote that:

> [i]n cases where suppression serves no purpose, it is far too extreme a remedy: Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality this is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. *Id.* at 410-411, citing *Stone v. Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed2d 1067 (1976).

In another dissenting opinion by Justice Boyle she stated that if the exclusionary rule would not have a deterrent effect, then it should not be applied. Excluding evidence in such a situation would not advance the purpose of the rule but would instead "promote public disrespect for the legal process." *People v. Sloan*, 450 Mich 160, 201; 538 NW2d 380 (1995). Justice

Riley and Justice Weaver both concurred with Justice Boyle's dissent.

In a recent opinion by this Court, it appears that the Defendant's argument that the exclusionary rule in Michigan is in effect to protect its citizens from more than just police misconduct is without merit. More importantly, it seems the good faith exception to the exclusionary rule has been adopted without the Court specifically calling it "good faith." In *People v. Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001), the FBI obtained a federal search warrant for a house in Michigan. *Id.* at 689. The affidavit was sealed to protect the sources and was not left at the scene after the warrant was executed as was required by MCL 780.654; MSA 28.1259(4). *Id.* 690-91. Therefore, as part of a later state prosecution, the defendant successfully moved to suppress the evidence. *Id.* at 691. The Court of Appeals affirmed. *Id.* at 692. This Court, citing *People v. Stevens* (After Remand), 460 Mich 626, 631; 597 NW2d 53 (1999), confirmed "that the exclusionary rule 'is not meant to put the prosecution in a worse position than if the **police officers'** improper conduct had not occurred . . ." (emphasis added). *Sobczak-Obetts* at 709. This Court reversed the order suppressing the evidence, holding that suppression "would be particularly unwarranted in the instant case, where there has been no **police** misconduct and where, therefore, the deterrent purpose of the exclusionary rule would not be served" (emphasis added). *Id.* 712-13. Despite the fact that the reasoning used to decide *Sobczak-Obetts* is identical to that of good faith, this Court simply did not use the words "good faith" during its analysis.

Since Michigan affords no greater protection than does the Fourth Amendment of the United States Constitution, federal law controls. Federal law recognizes a good faith exception to the exclusionary rule. *Arizona v. Evans*, 514 US 1; 131 LE2d 34; 115 S Ct 1185 (1995).

*Evans* is on all fours, factually, with the instant case. In *Evans*, the police performed a traffic stop on the defendant. *Id.* at 4. The officer ran the defendant's name through the computer which indicated that there was an outstanding misdemeanor warrant for the defendant's arrest. *Id.* The defendant was placed under arrest and the officer discovered a marihuana cigarette as the defendant dropped it. *Id.* A bag of marihuana was also found in the defendant's car. *Id.* Subsequently, the officer learned that the arrest warrant had been quashed 17 days earlier but due to an error by a court employee, had not been removed from the police computer record. *Id.* at 4 and 16. Since the error was not attributable to the police in any way, the Court ruled that the deterrent purpose of the exclusionary rule could not be met by suppressing the evidence and therefore the good faith exception applied.

State law should mirror federal law by recognizing the validity of the good faith exception to the exclusionary rule. Michigan would be in good company if it did just that. Not including the outdated Michigan decisions mentioned above, there are only 13 states which have rejected the good faith exception to the exclusionary rule as it relates to each state's constitution. *2000 N Dakota Law Review,* 76 N Dak L Rev 123, footnote 203. These states, unlike Michigan, apparently grant their citizens more protection under their state constitution then they possess under the federal constitution when it comes to the Fourth Amendment.

Logically, there is no reason to reject the good faith exception to the exclusionary rule in Michigan state courts. "Where 'the exclusionary rule does not result in appreciable deterrence, then, clearly its use . . . is unwarranted.'" *Evans* at 11, citing *United States v. Janis*, 428 US 433; 96 S Ct 3021; 49 L Ed2d 1046 (1976). The police in this case relied in good faith on a warrant that a circuit judge issued. The exclusionary rule is designed to deter **improper police conduct**

by suppressing evidence. In this case, there was no improper police conduct to deter. The judge erred by authorizing the warrant without an affidavit. "[T]he exclusionary rule was historically designed 'to deter police misconduct rather than to punish the errors of judges and magistrates.'" *Evans* at 11, citing *Illinois v. Krull*, 480 US 340; 107 S Ct 1160; 94 L Ed2d 364 (1987).

> Where the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' *Evans* at 11-12 citing *United States. v. Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed2d 677 (1984).

The reason that the good faith exception to the exclusionary rule has yet to be adopted in Michigan, is not because of a long line of sound prior precedent as the defense suggests, but rather merely because this Court has not directly addressed the issue since the *Faucett* decision. Therefore, because the current case law and public policy support the good faith exception, this Court should reverse the Court of Appeal's ruling to the contrary and reinstate the District Court's ruling denying the Defendant's Motion to Suppress Evidence and thereby reinstate his conviction.

## REQUEST FOR RELIEF

The People request this Court to recognize the good faith exception to the exclusionary rule and thereby reverse the Court of Appeals' ruling which ordered suppression on the evidence.

DATED: 8-19-02

Respectfully submitted,

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